IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1206 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DEPUTY COLLECTOR AND CHAIRMAN & 1 - Petitioner(s)

Versus

MOHAMAD FAROOQU RAZVI - Respondent(s)

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Appearance :

MR AMAR D MITHANI for Petitioner(s) : 1 - 2.
MR DHARMENDU PANDYA for Respondent(s) : 1,
MR JJ DAVE for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 20/01/2006

ORAL JUDGMENT

1. Heard learned Advocate, Mr.Amar D. Mithani, on behalf of petitioners and learned Advocate, Mr.J.J.Dave, appearing for respondent No.1.

2. In the present petition, petitioners have challenged the order passed by Labour Court, Junagadh in Recovery Application No.79 of 1997 dated 8th April,2002. The said order is passed by Labour Court, Junagadh while exercising power under Section 33(C)(2) of I.D.Act,1947. This Court, at the time of issuing rule, has passed detailed orders on 17th March,2003. The said order dated 17th March,2003 reflects the entire history of the case between the parties and, therefore, it is necessary to incorporate the said order, which reads as under :

> “1. Taking into consideration the importance of the issue arising in this petition, in the following facts,namely, the person employed by `Mosque Makbara Committee' of Junagadh as `Khatib' approached the Labour Court by filing a recovery application under Section 33(C)(2) of the I.D.Act challenging the order dated 14th March, 1997 passed by petitioner no.2, the Mamlatdar, in the capacity of `Secretary-Mosque Makbara Committee', Junagadh, who also filed an application for interim relief to the effect that the authorities be restrained from deducting the wages for the period for

which he had applied for leave; the learned Judge of the Labour Court allowed the application for interim relief and directed to make payment, which was paid; and, finally, by an order dated 8th April, 2002, the Recovery Application is partly allowed and the order of the Mamlatdar dated 14th March, 1997 is declared illegal and wages for the period for which privilege leave was not granted is ordered to be paid with a cost of Rs.2000=00, by an order dated 11th March, 2003, an advance copy of the petition was ordered to be served to the learned Additional Advocate General to assist the Court. He is present before the Court and rendered valuable assistance.

2. The present petition is filed by the Deputy Collector, who is also Ex Officio Chairman, of `Mosque Makbara Committee' challenging the order dated 8th April,2002 passed by the Labour Court, Junagadh in Recovery Application No.79 of 1997, whereby the recovery application is allowed quashing and setting aside the order dated 14th March, 1997 passed by the Mamlatdar, Junagadh, in his capacity as `Secretary of Mosque Makbara Committee', rejecting the application of the respondent, who is `Khatib' of Jumma Masjid Junagadh.

3. Despite the fact that the respondent was employed as `Khatib' by the Mosque Makbara Committee, the recovery application was entertained by the learned Judge on the ground that earlier two recovery applications were entertained by the then learned Judge, being Recovery Application Nos.415 of 1991 and 474 of 1992, and the orders passed therein were though challenged before this Court, the challenge was not upheld. Mr.Mithani, learned Advocate for the petitioners, produced a xerox copy of the certified copy of the order of this Court in Special Civil Application No.5423 of 1993 filed against the order passed in Recovery Application No.415/1991. The order is reproduced for ready perusal:

> “The grievance of the petitioners is that while allowing the Recovery Application, the Labour Court has observed that the provisions of B.C.S.R. are applicable to the service condition of the respondent workman. Even if it is assumed for a moment that the aforesaid observations made by the Labour Court is erroneous and the provisions of the B.C.S.R. are not applicable the petitioners would not be discharged of the liability to make payment of Rs.690/- as and by way of wages for the leave period. It is a fact that leave has been sanctioned. It is also a fact that leave has been sanctioned conditionally, that is to say, the workman was required to withdraw the case filed by the respondent workman against the Government. The Labour Court has rightly

observed that such condition should not have been imposed while granting leave. In view of this position, the question, whether the provisions of BCSR are applicable to the service condition of the workman or not, pales into insignificance. The fact remains that the leave was sanctioned and it was sanctioned by imposing unlawful condition. Therefore, such unlawful condition has got to be ignored. In this view of the matter, the order passed by the Labour Court directing the petitioners to make payment of Rs.690/- as and by way of wages for the period commencing from 17-8-90 to 30-8-90 cannot be said to be in any way unjust or arbitrary so as to call for interference by this Court in exercise of the powers under Article 227 of the Constitution of India. The Labour Court has rightly awarded Rs.150/- as costs and has committed no error in directing payment of interest, if the award is not complied with within a period of 30 days from the date of receipt of the order. Moreover, the amount involved is a very small amount. Therefore also, we do not think that it would be proper for this Court to exercise powers under Article 227 of the Constitution of India. It is clarified that rejection of this petition shall not be construed as confirming the observation made by the Labour Court that that provisions of the BCSR are applicable to the service condition of the respondent workman.

Subject to the aforesaid observations and clarifications, the petition is rejected."

4. While considering the aforesaid order

of this Court, the learned Judge of the Labour Court overlooked the following important observations of the Division Bench,

> "... ... ...Even if it is assumed for a moment that the aforesaid observations made by the Labour Court is erroneous and the provisions of the B.C.S.R. are not applicable ... ..."
>
> (emphasis supplied)

> "... ... Moreover, the amount involved is a very small amount. Therefore also, we do not think that it would be proper for this Court to exercise powers under Article 227 of the Constitution of India. It is clarified that rejection of this petition shall not be construed as confirming the observation made by the Labour Court that that provisions of the BCSR are applicable to the service condition of the respondent workman."
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> (emphasis supplied)

The learned Judge ought to have appreciated that the Court did not interfere with the order passed by the Labour Court mainly on account of smallness of amount and besides the Court made it clear that

rejection of this petition shall not be construed as confirming the observations made by the Labour Court to the effect that the provisions of the B.C.S.R. are applicable to the service conditions of the respondent. Overlooking this important aspects, the learned Judge has committed an error in allowing the recovery application.

5. The learned Judge has also committed an error in entertaining the Recovery Application under Section 33(C)of the I.D. Act, 1947. The learned Judge has not considered the written submissions. The learned Additional Advocate General has produced on record a letter dated 4th June, 1992, issued by the Office of the Deputy Labour Commissioner, Rajkot. It is addressed to (i) Collector, Manager-Mosque Makbara Juma Masjid, Junagadh; (ii) Deputy Collector, Junagadh; (iii)Mamlatdar,Junagadh; and, (iv) General Secretary of Maha Gujarat General Works Union Ltd., Junagadh. It is specifically stated therein that the authority had considered the report of the Conciliation Officer in the matter of dispute between the Collector Manager, Mosque Makbara, Committee, Junagadh and its employees. After considering the said report, the authority has come to the conclusion that the establishment (Mosque

Makbara Committee) is a religious institution registered under the Trust Act, that it is not doing business activities and earning income therefrom, that its income is limited, its employees cannot be granted the pay scales, allowances, pension and other benefits available to the Government employees, and, that the establishment cannot be compelled to pay the same. The demand is rejected. The learned Additional Advocate General has also produced a copy of the letter dated 1st March, 2000 also written by the Labour Commissioner, Ahmedabad to the Chairman, Mosque Makbara Committee and Mamlatdar Office, Junagadh, wherein it is stated that pursuant to your complaint dated 30th September, 1999, a report was called for from the deputy Labour Commissioner, Rajkot. In the said report, it is stated that your institution is registered under the Public Trusts Act and it is not falling in the purview of I.D.Act. Your institution is a religious institution and it does not undertake any business activity. It has a limited income and hence, the benefits available to the Government employees cannot be granted to the employees of the institution.

6. Mr.A.D.Mithani, the learned Advocate, produced a list of Recovery Applications

pending before the Labour Court, Junagadh, which are as under :

Sr.No.	Recovery Application No.	Filed by
1.	43/1996	Mohmmad Amin H. Kadri
2.	61/1996	Patni Mohmmad Rehman
3.	132/1996	Eight persons.
4.	126/1999	Hajik Mohmmad Farook Razvi
5.	50/2002	Hajik Mohmmad Farook Razji
6.	75/2002	Hazik Mohmmad Farook Razvi

Mr.Mithani also placed a list of cases decided by the Labour Court, Junagadh along with the details of the amount paid under the orders of the Labour Court, which is as under :

Sr.No.	Recovery ApplicationNo.	Amount	Particulars (Rs.)
1.	415/1991	690=00	Salary of leave period.
		150=00	Cost awarded by Labour Court.
		84=00	Interest.
		924=00	Total...
2.	301/1995	460=00	Salary of leave

			period.
	18/01/2001	250=00	Cost awarded by Labour Court.

		710=00	Total...
3.	474/1992	214.20	Salary of leave period.
	7/3/1996	100.00	Cost.

		314.00	Total...

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7. On perusal of the list, it is found that one and same person has been filing various Recovery Applications for recovery of salary of the leave period. Earlier, he filed Recovery Application No.415 of 1991 wherein the learned Judge of the Labour Court was pleased to award him Rs.690=00 towards the salary of leave period and Rs.150=00 towards the costs and the authorities had paid him a sum of Rs 924=00 including interest of Rs.84=00. He again filed Recovery Application No.301 of 1995 whereunder he was paid a sum of Rs.460=00 towards the salary of leave period and costs of Rs.250=00, totaling to Rs.710/-. One another Recovery Application No.474 of 1992 was filed by one Shri Razakbin Umarbhai, wherein he was awarded an amount of Rs.214.20 towards the salary and Rs.100=00 towards the costs, against which Special Civil Application No.9889 of 1996 was filed but the same was dismissed on account of smallness of amount.

Mr.Mithani submitted that though an important question of law arises, the petitions were not entertained by this Court mainly on account of smallness of amount. The question is as to whether `a person who is employed as "Khatib" by "Mosque Makbara Committee" can be put at par with a Government servant' and, therefore, he requested that without considering the quantum of wages ordered by the learned Judge, which is not calculated for the present, the order of the learned Judge whereby he is pleased to quash and set aside the order dated 14th March, 1997 and order to grant the benefits of privilege leave to the applicant-respondent herein. along with costs of Rs.2000=00, this petition be entertained.

8. RULE. Ad-interim relief in terms of paragraph 24(B)

9. Mr.Mithani to place on record the information regarding as to from which funds the amount as ordered in various Recovery Applications, referred to herein above, were paid. He shall also place on record as to from which funds the legal expenses were incurred for contesting the aforesaid legal proceedings before the Labour Court and this Court. This information is

required because the Collector is Ex-Officio Chairman of the Mosque Makbara Committee while the Mamlatdar is the Ex-Officio Secretary. This amount cannot be paid from the Government funds nor expenditure can be incurred towards legal proceedings filed against the Committee.

10. Office is directed to send a copy of this order to all the learned Judges of the Labour Court. Office is also directed to place a copy of the order passed by the learned Judge in Recovery Application No.79 of 1997 dated 8th April, 2002 before the learned Administrative Judge relating to the Labour Courts."

3. I perused above order. The impression is that respondent – workman is in habit of filing such kind of applications and obtained order from Labour Court. Due to smallness of amounts, normally, Courts are not interfering with order. But, no Court in his case examining the issue of jurisdiction raised by petitioner. That encourage the respondent to file such application by some intervals. That amounts to misuse and abuse of process of law by respondent. Therefore, such conduct of respondent gives real

cause to examine the matter on question of jurisdiction.

4. The respondent has filed Recovery Application before Labour Court, Junagadh with a prayer to set aside the order dated 14th March,1997 passed by petitioner, wherein, leave of respondent has been rejected. The order dated 14th March,1997 is placed on record at Page-22 by Mosque Makbara Committee and Mamlatdar, Junagadh. This order has been passed on application of respondent dated 18th February, 1997 for claiming leave salary of 50 days for the period from 25th February,1997 to 15th April, 1997. The reasons given by petitioner for rejecting the leave application are that respondent is a part time employee of the Public Trust and, therefore, respondent is not entitled for any amount of leave salary (earned leave) and, therefore, his application has been rejected by the petitioner. This gave a cause of action to the respondent for filing Recovery Application under Section 33 (C) (2) of I.D.Act,1947. In Recovery Application itself, specific averment was made to set aside order of rejection of earned leave

dated 14th March,1997 and to grant benefit of earned leave of 50 days in favour of respondent. The petitioner has filed detailed reply against Recovery Application. Certain documents were also produced before Labour Court by petitioner and written submissions placed on record of recovery by petitioner before Labour Court.

5. The contention raised by petitioner before Labour Court that claiming earned leave which was rejected by petitioner, Labour Court has no jurisdiction to exercise power under Section 33(C)(2) of I.D.Act,1947 and for that, machinery under Section 10 of the I.D.Act is required to be undergone by respondent. This specific contention was raised in written statement and also in written submission and also orally raised before Labour Court. The Labour Court, Junagadh has allowed the application by order dated 8th April,2002 while setting aside the order of rejection dated 14th March,1997 held to be illegal and unreasonable and directed the petitioner to pay the amount of earned leave for a period of 50 days with cost of Rs.2000/-.

6. Now question is required to be examined by this Court which has been raised by petitioner before this Court that Labour Court has no jurisdiction under Section 33(C) (2) of the I.D.Act,1947 to adjudicate the issue which was raised by respondent before Labour Court and that power is with the Labour Court / Tribunal to adjudicate the issue and pass appropriate award while exercising power under Section 10 of I.D.Act,1947.

7. I have heard learned Advocate, Mr.Mithani on this issue. He raised this contention that Labour Court has no jurisdiction under Section 33(C) (2) of I.D.Act,1947 and he relied upon the decision of Apex Court in case of State of U.P. & Anr. Vs. Brijpal Singh, (2005) 8 SCC 58. He also referred the documents which are on record and also pointed out that civil suit filed by respondent has been withdrawn for a declaration that he may be treated as civil servant and other facts also narrated by him. He pointed out that on each and every occasion, such kind of application was filed by respondent, who

is in habit of filing such application. Because of the smallness of amount, Labour Court has granted the same and this Court has not interfered with such order of Labour Court considering the smallness of amount. Therefore, he submitted that now, in this case, it is necessary to examine the legal aspect of the matter, whether in light of these facts, claim by respondent, whether Labour Court has jurisdiction under Section 33(C)(2) of I.D.Act,1947 or not ? This Court is examining this question in this petition.

8. I have heard learned Advocate, Mr.J.J.Dave, at length about one hour. His arguments were almost on merits of the case but, not on the issue of jurisdiction. He pointed out that respondent was appointed by State Government; his pay fixation was made by Government; he was remained in service for more than 27 years and he was working as a full time and not as part time. Roster and other documents were also shown to this Court to point out that he was a Government employee and entitled the benefits of BCSR Rules. Ultimately, his submission is that earlier such kind of orders passed by Labour Court

were challenged by petitioner, not interfered by this Court and, therefore, this petition because of the fact that Rs.600/- is already paid in the year 1998 which has been granted by Labour Court, so considering smallness of amount, this petition may be also on the same line to be dismissed. He referred number of judgments wherein merits are pointed out. But, that decision, which has been relied on by Mr.Dave on merits, which has been canvassed before this Court, are not relevant for examining legal question, whether Labour Court has jurisdiction or not. He also pointed out that a quarter has been given to respondent which is near to Mosque. In Shilalekh, mosque is belong to Government property is specifically mentioned and even though, petitioner is objecting benefit which is available to respondent under the Government Rules. He also pointed out certain allegations against petitioner that vital documents willfully hided by petitioner and obtained stay order from this Court and this Makbara has been controlled and administrated by Government. Therefore, in short, his submission is that Labour Court has rightly examined the merits of the matter

and respondent was entitled the said amount and, therefore, Labour Court has rightly granted the said amount in favour of respondent. Said amount is already paid in 1998 and cost which has been imposed by Labour Court is reasonable, justified and, therefore, no interference is required by this Court while exercising the power under Article 227 of the Constitution of India.

9. Learned Advocate, Mr.Dave, has not made any submission about the jurisdiction of the Court under Section 33(C)(2) of I.D.Act,1947. His all arguments are related to merits which is not necessary to be examined by this Court when the legal question is examined by this Court.

10. I have perused the order passed by Labour Court and also perused the written statement and written submissions filed by petitioner. A specific contention which was raised before Labour Court by petitioner is that Labour Court has no jurisdiction under Section 33(C) (2) to adjudicate the issue, whether order dated 14th March,1997 is legal or not.

For that, respondent shall have to raise industrial dispute for adjudication and then, labour Court or Tribunal has power to adjudicate such issue. Labour Court has not considered this contention at all which has been raised by petitioner about its jurisdiction. I have perused entire order page to page but, it is very difficult to find out such discussion in the recovery order, whether question of jurisdiction has been examined by Labour Court or not ? On the contrary, there is clear finding given by Labour Court that order passed by petitioner dated 14th March,1997 rejecting the claim of earned leave of the respondent is illegal, unconstitutional and, therefore, respondent is entitled the earned leave for a period of 50 days from period 25th February,1997 to 8th April,1997.

11. The law on this issue is very settled long back, whether Labour Court has jurisdiction under Section 33(C) (2) of I.D.Act,1947 or not ? The recent decision on the question is reported in case of State of U.P. Vs. Brijpal Singh (Supra) and the relevant observations made by Apex Court are in Para.8, 10 and

11 and ultimately, Apex Court has considered the decision of State Bank of India V/s. Ram Chandra Dubey, reported in 2001 1 SCC 73. The Apex Court, after discussing all the relevant decisions on the subject, has enunciated the principles in the decision referred has been summed up as under :

> "8. In the background facts of this case, the following questions of law arise for consideration by this Court :
>
> (1) Whether the High Court erred in allowing the order passed by the Labour Court filed by the respondent under Section 33-C(2) of the Industrial Disputes Act ?
>
> (2) Whether the pendency of Writ Petition No.15172 of 1987 filed by the respondent herein, same being not finally disposed of, the liability to pay, if any to the workman concerned under Section 33-C(2) of the ID Act, does arise or not ?
>
> (3) Whether the High Court gravely erred in allowing the salary and bonus to the respondent, although he has not attended the office of the appellant after the stay order passed by the High Court dated 28.10.1987 ?

(4) Whether the Labour Court has jurisdiction to entertain and decide the undetermined claim ?"

"10. It is well settled that the workman can proceed under Section 33-C(2) only after the Tribunal has jurisdiction on a complaint under Section 33-A or on a reference under Section 10 that the order of discharge or dismissal was not justified and has set aside that order and reinstated the workman. This Court in the case of Punjab Beverages (P) Ltd. v. Suresh Chand held that a proceeding under Section 33-C(2) is a proceeding in the nature of execution proceeding in which the Labour Court calculates the amount of money due to a workman from the employer, or, if the workman is entitled to any benefit which is capable of being computed in terms of money, proceeds to compute the benefit in terms of money. Proceeding further, this Court held that the right to the money which is sought to be calculated or to the benefit which is sought to be computed must be an existing one, that is to day, already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between the industrial workman, and his employer. This Court

further held as follows : (SCC p.150, para.4)

"It is not competent to the Labour Court exercising jurisdiction under Section 33-C(2) to arrogate to itself the functions of an Industrial Tribunal and entertain a claim which is not based on an existing right but which may appropriately be made the subject-matter of an industrial dispute in a reference under Section 10 of the Act." "

"11. In the case of Municipal Corpn. of Delhi v. Ganesh Razak this Court held as under:(SCC pp.241-42, paras 12-13)

"12. The High Court has referred to some of these decisions but missed the true import thereof. The ratio of these decisions clearly indicates that where the very basis of the claim or the entitlement of the workmen to a certain benefit is disputed, there being no earlier adjudication or recognition thereof by the employer, the disputes relating to entitlement is not incidental to the benefit claimed and is, therefore, clearly outside the scope of a proceeding under Section 33-C(2) of the Act. The Labour Court has no jurisdiction to first decide the workmen's entitlement and

then proceed to compute the benefit so adjudicated on that basis in exercise of its power under Section 33-C(2) of the Act. It is only when the entitlement has been earlier adjudicated or recognized by the employer and thereafter for the purpose of implementation or enforcement thereof some ambiguity requires interpretation that the interpretation is treated as incidental to the Labour Court's power under Section 33-C(2) like that of the executing court's power to interpret the decree for the purpose of its execution.

13. In these matters, the claim of the respondent workmen who were all daily -rated/casual workers, to be paid wages at the same rate as the regular workers, had not been earlier settled by adjudication or recognition by the employer without which the stage of computation of that benefit could not reach. The workmen's claim of doing the same kind of work and their entitlement to be paid wages at the same rate as the regular workmen on the principle of 'equal pay for equal work' being disputed, without an adjudication of their dispute resulting in acceptance of their claim to this effect, there could

> be no occasion for computation of the benefit on that basis to attract Section 33-C(2). The mere fact that some other workmen are alleged to have made a similar claim by filing writ petitions under Article 32 of the Constitution is indicative of the need for adjudication of the claim of entitlement to the benefit before computation of such a benefit could be sought. Respondents' claim is not based on a prior adjudication made in the writ petitions filed by some other workmen upholding a similar claim which could be relied on as an adjudication enuring to the benefit of these respondents as well. The writ petitions by some other workmen to which some reference was casually made, particulars of which are not available in these matters, have, therefore, no relevance for the present purpose. It must, therefore, be held that the Labour Court as well as the High Court were in error in treating as maintainable the applications made under Section 33-C(2) of the Act by these respondents."

12. This Court has recently decided the said issue in Special Civil Application No.13494 of 2003 by order dated 18.1.2006. The relevant decision which

has been considered by this Court in Para.3 is narrated as under :

> “3. I have considered submissions made by learned advocate Mr. Dave on behalf of petitioner. I have perused order of labour court which is under challenge in this petition. I have also examined submission of Mr. Dave that labour court has no jurisdiction to adjudicate issue while deciding recovery application under section 33-C-2 of ID Act, 1947 as if it was having power under section 10 of ID Act. Law on this point is settled by Hon'ble Supreme Court. (See : Municipal corporation of Delhi versus Ganesh Razak and Another, 1995-I-LLJ 395 SC; Naranji Peraji Transport Co. versus Ramnikbhai B. Waghela, 1998 (1) GLH 88; Lallubhai Bapujibhai Parmar versus Panchmahal District Panchayat, 2005 (3) GCD 2621 (Guj); State of UP and Another versus Brijpal Singh, 2005 SCC (L&S) 1081; Regional Manager, Bank of Baroda v. Gitaben Harihai Darji (D) by LRs and others, 2005 Lab IC 2917; M/s. Central Group and others etc. v. Motiram S. Thakare and etc., 2005 Lab IC 2933].
>
> In view of law laid down by apex court as well as this Court, claim which was made by workman before labour court by filing application for recovery u/s. 33-C-2 of ID Act

cannot be examined or right cannot be adjudicated by labour court while exercising such powers under sec.33-C-2 of ID Act, 1947. Pre-existing right was not proved by respondent before labour court as claim of respondent was not admitted by petitioner. On the contrary, such right was disputed by petitioner before labour court. Perusal of evidence of workman as well as petitioner makes it clear that such right was not crystallized by respondent before labour court. Looking to such evidence of petitioner and respondent before labour court in light of the law crystallized by apex court and this Court referred to herein above, labour court has committed jurisdictional error in granting recovery application in exercise of powers under sec. 33-C-2 of ID Act, 1947. Observation of labour court that petitioner has admitted such claim of over time wages is not correct and it is contrary to evidence on record. Therefore, finding of labour court, to that extent, is perverse and contrary to evidence on record. Further, respondent has filed recovery application after termination of his service by petitioner. For a period of upto six years, he never made any complaint before Government Labour Officer or any other higher authority in respect of his claim for over

time wag es. Not only that, during last six years from the date of date of his joining till date of termination, he never claimed before petitioner by giving such application for OT amount but raised such claim only after termination of his service by petitioner. After termination of his service, workman raised claim for Over Time wages for six years and it was admitted by him that prior to that, he had never complained or claimed for it before any authority or before petitioner. Therefore, it is a case filed by respondent against petitioner to have some pressure for settling matter against termination. It is also submission of learned advocate Mr. Dave that against termination, industrial dispute has been raised by respondent against petitioner and it has been referred to for adjudication to labour court. According to his submission, such conduct of respondent ought to have been appreciated by labour court. Labour court has not at all examined and appreciated such conduct of respondent.

Therefore, in view of above facts as well as considering law laid down by apex court and this court, labour court has committed error in examining matter under sec. 33-C-2 of ID Act as if the claim was admitted by

petitioner. Respondent has not proved pre-existing right which can be encashed by filing such application, Therefore, labour court has committed gross error in passing such order and, therefore, impugned order of labour court is required to be quashed as the finding of labour court are without jurisdiction, perverse and contrary to evidence on record.

Consequently, this petition is allowed. Order passed by labour court in Recovery Application No. 2421 of 1994 dated April 2, 2003 is hereby quashed. Said recovery application is hereby dismissed. Rule is made absolute. No order as to costs."

13. In view of this law which has been established by recent decision as well as earlier decisions on the subject by Apex Court as well as this Court, Labour Court has no jurisdiction to adjudicate the issue, whether workman is entitled or not. The legal right is considered to be pre-existing right or a due amount against employer can be encashed by Recovery Application. But, if the legal right or any right, if it is disputed by employer, then, Labour Court has no jurisdiction to grant such Recovery Application in

favour of workman. In this case, amount of earned leave was claimed by respondent. This claim was rejected rightly or wrongly by petitioner by order dated 14th March,1997. Once the claim of respondent was rejected by specific order, then, unless and until that order is set aside by appropriate forum, workman is not entitled amount of earned leave being a due amount or as pre-existing right and in these circumstances, Labour Court has no jurisdiction to adjudicate the issue in Recovery Application under Section 33(C)(2) that order of rejection passed by petitioner is correct or not or legal or not. This is beyond the scope of Labour Court and Labour Court has no jurisdiction to examine such issue as if that Labour Court is adjudicating the issue under Section 10 of the I.D.Act,1947. Therefore, according to my opinion, Labour Court has committed gross error in granting such application for which it has no jurisdiction to examine such issue under Section 33(C) (2) of I.D.Act,1947. Therefore, order passed by Labour Court is required to be quashed.

14. It is necessary to be noted that in spite of the

contention raised by petitioner that when notice of Recovery Application was received by petitioner that Labour Court has no jurisdiction to examine such issue, even though in entire order Labour Court has not discussed the contention raised by petitioner about the jurisdiction. This may be a lapse on the part of Labour Judge, who has decided this case. If any contention raised by any party, it is a duty of the Court to consider the same and to pass appropriate orders on that contention. Labour Court has given details about application and discussed the written statement and affidavit by respective parties but, nowhere, though specific averment is made by petitioner at Page-62, internal Page-5, that Industrial Disputes Act is not applicable and Labour Court has no jurisdiction but, in subsequent paragraph, Labour Court has not discussed this contention and simply considered the merits and earlier decision on the same subject of Labour Court as well as this Court and passed order granting the amount of earned leave in favour of respondent. Therefore, Labour Court has not discussed the issue / contention raised by petitioner about the

jurisdiction and straightway, decided the matter on merits as if Labour Court has exercised the power under Section 10 of the I.D.Act, 1947. For that, Labour Court has no jurisdiction and, therefore, order passed by Labour Court in Recovery Application No.79 of 1997 dated 8th April,2002 is required to be set aside. In result, order passed by Labour Court, Junagadh in Recovery Application No.79 of 1997 dated 8th April,2002 is hereby quashed and set aside. Rule is made absolute with no order as to costs. However, it is made clear that amount which has been ordered by Labour Court about Rs.600/- for earned leave of 50 days which was already paid in the year 1998 to respondent may not be recovered by petitioner from the respondent because of the order passed by this Court. The Registry is directed to send copy of said order to President of Industrial Court with direction to communicate copy of order of this Court to concerned Labour Judge, Shri I.J.Makwanam, whose order is set aside by this Court in present proceeding.

(H.K.RATHOD,J.)

(vipul)